

Questioning Retribution, Valuing Humility

Samuel H. Pillsbury*

JEFFRIE G. MURPHY, *PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION* (Oxford University Press 2012)

Jeffrie Murphy, a Kantian philosopher by training, has played an important role in the dialogue between American criminal law and Anglo-American philosophy for some forty years now. A staunch retributivist even back in the day (hard though it is to imagine now) when retribution was out of fashion in both law and philosophy, he has helped a generation of legal scholars appreciate the nature and value of retributive principles in criminal law. Equally important, his work has introduced philosophic methods to criminal law scholarship, improving the depth and rigor of work in the field. And now, this.

Now appears a volume of essays in which Murphy raises uncomfortable questions about retribution, at least as it is often employed. He raises hard questions about central aspects of legal liberalism that he has previously championed, notably the claim that liberalism eschews all questions about the good. Perhaps most striking, Murphy, whose intellectual bedrock is Immanuel Kant, now turns to Christianity for normative guidance. Murphy has gotten (well, kind of) religion. This hard-nosed thinker who has cast a skeptical eye on efforts to bring forgiveness and mercy into criminal justice decision-making, now goes on at some length about the value of forgiveness in responding to crime. Here he's talking about—and talking up—love as a guiding moral force, as in, we should love our neighbors as we do ourselves. There is no mention of campfires and singing songs while holding hands in these essays—but still. For some Murphy fans, hackles may be raised. Eyebrows definitely should be.

What's going on here? Has Murphy gone soft in his old age? He makes explicit mention of advancing years in his introduction to this book of essays (P. xxi.), rather inviting the question. Of course there's also the chance that, imbued with the insight of greater life experience, he has come to see the limits of earlier methods and principles. Forced to choose between these two options, I would certainly select the latter—and yet the discontinuity between early and late Murphy, between what he has argued before and does here, can be exaggerated. The powers of insight, clarity of prose, catholic use of sources from a wide range of writers philosophic and literary, contrarian vision and unusual capacity for connecting legal issues with philosophic discourse that mark this volume have been hallmarks of his work for many years.

* Samuel H. Pillsbury is a professor of law at Loyola Law School Los Angeles. He also works as a volunteer chaplain in the Los Angeles County jails and juvenile detention halls.

Most significant for those concerned with criminal justice are the questions that Murphy raises about retribution, especially the *kind* of questions that he raises. In many ways, this is Nixon going to China. Here we have a philosopher committed to retributive principles recognizing that there are significant dangers in its application. We have a legal philosopher bringing to the field a set of psychological insights and concerns that normally stand outside of academic discourse. Where modern philosophy and law usually exclude personal considerations, Murphy makes them his very subject. Here we have a thinker confident enough to journey into territory, such as Christian theology, where he is no expert, and where others will consider the foray itself foolish and dangerous. Lots of interesting stuff here.

This is not a book of grand theory and does not pretend to be. It is very much a collection of essays, all but one of which have appeared previously in law or philosophy journals. The essays often overlap significantly in subject matter; some of the same arguments and quotations appear in several essays, which will give some readers an unwelcome sense of *déjà vu*. Yet there is much of value here, much to learn about the way we should think about criminal law and philosophy in the twenty-first century. The changes in Murphy's own philosophy of criminal responsibility, so much in evidence here, reflect changes that should occur in the larger body politic. They also suggest some ways that criminal law scholars might reconsider their own vocation. More about that at the end.

I. PHILOSOPHY, EMOTION, AND THE TURN TO THE PERSONAL

In these essays Murphy explores, defines, and critiques the moral emotions relevant to criminal justice. Rather than focusing exclusively on thoughts and actions, which are normally the subject of moral philosophy, Murphy considers the emotions that motivate moral thought and action. In this effort he joins a long line of philosophers concerned with the virtues and vices of humanity who explore morality through character.¹

In turning to the realm of the emotions, Murphy necessarily turns to the personal. Emotions are quintessentially personal experiences; feelings signify importance to the person feeling them. Just to give one simple example, imagine a city dweller on his way to work who witnesses a homeless woman run over and

¹ In Greek philosophy, this is most associated with Aristotle. See e.g., ARISTOTLE'S *NICOMACHEAN ETHICS* (Robert C. Bartlett & Susan D. Collins trans., The University of Chicago Press 2012) (c. 384 B.C.E.). It was a major concern of Enlightenment thinkers such as Adam Smith in his *THE THEORY OF MORAL SENTIMENTS* (1759) and David Hume in *A TREATISE OF HUMAN NATURE* (1739–40 ed.). Both Smith and Hume saw the emotions as a critical subject for moral inquiry. In recent years, Alasdair MacIntyre, has helped revive this approach in moral philosophy. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL VIRTUE* (2d ed. 1984). In criminal law, Kyron Huigens is among those who has emphasized the importance of character in criminal responsibility determinations. E.g., Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627.

killed by a driver just a few feet from where he stands. Imagine this person displays no emotion except impatience with the commotion and investigation that follows. After excluding the possibilities of shock or mental disorder, we will be morally troubled, suspecting that this person's evident lack of feeling indicates a lack of moral concern for the welfare of others. Here we see how emotion connects with morals in our daily lives, making emotion a rich subject for the moral philosopher.

In studying the moral emotions, Murphy connects philosophy to psychology, making the psychological, or at least some aspects of it, the subject of philosophic inquiry. Philosophy here is not reduced to psychology. Instead this approach conceives of philosophy as embodied, the product and instrument of emotional human beings. This makes it especially appropriate to law, whose rules can never be entirely disentangled from the messiness of their particular human—and emotional—origins and applications.

This is an approach that for a legal philosopher requires a certain intellectual humility, because it does not lend itself to the enumeration of first principles that structure (or should) great swaths of law. This comports with Murphy's frame of mind. Several times he quotes the jurisprudential writer Herbert Hart, who rejected the pursuit of "uniformity at the price of distortion." (P. xi, 5, 207 n. 39, 272.) Murphy recognizes that even the most abstract and successful normative theory in philosophy may come from very particular personal experience. Murphy quotes Iris Murdoch as saying that the first question that should be asked of any philosopher is, "what is he afraid of?" (P. 87.)² In the long run, the most valuable aspect of Murphy's turn to the personal is the way that it supports the virtue of moral humility, which he sees as critical to just punishment. I very much agree, as I explain in the final part of this review essay.

II. RETRIBUTION AND THE EMOTIONS

Murphy's current reservations about retribution stem from his concern with the emotions which may motivate its supporters. He returns to the punishment critique of Friedrich Nietzsche who in the early 20th century warned: "Mistrust all in whom the impulse to punish is powerful." (P. 22.) Nietzsche argued that those who favored retributive punishment were motivated by *ressentiment*, a kind of small-minded maliciousness that delights in the condemnation of others, and sees it as proof of self-righteousness. Nietzsche argued that support for retribution

² Murphy provides a great collection of other quotes from philosophers to the same effect. C.D. Broad: "we all learn our morality at our mother's knee or at some other joint." (P. 87.); Frederick Nietzsche: "Gradually it has become clear to me what every philosophy so far has been: namely, the personal confession of its author and a kind of involuntary and unconscious memoir." (p. 23 n.5.); Thomas Nagel: "Philosophical ideas are acutely sensitive to individual temperament, and to wishes." (P. 23 n.5.).

owes more to meanness than justice. Or as Murphy candidly states: "At their worst, retributivists are simply cruel." (P. 22.)

Murphy here revisits Michael Moore's defense of retribution against Nietzsche in Moore's classic essay *The Moral Worth of Retribution*.³ Murphy finds Moore's essential defense unsatisfactory. Moore argued that retributive judgments are based on guilt feelings, which in turn rest upon shared ideas of right and wrongdoing. Thus, guilt feelings have a sound moral foundation. Murphy responds pragmatically: how can we be sure that guilt feelings are morally justified? How can we be sure that they are not actually rationalizations of neurosis, or personal malice? How can we be sure that they are even rational? (P. 27.) And if the answer is that we can separate legitimate from illegitimate guilt feelings through careful, rational assessment of moral desert, then why bother with feelings at all?

The practical challenge presented by Nietzsche's criticism remains: most people base their moral judgments, including those concerning punishment, on their feelings, and those feelings are not always morally justified. Yet most are committed to their own feelings, and resist giving them up to a purely intellectual objection. Thus the influence of emotions on moral judgment, including punishment, can neither be fully accepted nor excluded. If we are concerned with moral judgment in human practice, rather than as a matter of theory, we must attend to personality, because personality tells us much about the emotions relevant to moral judgment. In this regard, Murphy candidly wonders about himself: "If I had been a kinder person, a less angry person, a person of more generous spirit and greatness of soul, would robust retributivism have charmed me to the degree that it at one time did? I suspect not." (P. 88.)

Murphy is especially concerned about emotional excesses inspired by what he calls character retribution. (P. 30.) This involves judging the basic character of the offender, so that, in Kant's words, punishment might be proportionate to the offender's "inner wickedness." This presents great dangers of self-deception on the part of the judge and disproportionate punishment in fact. (Pp. 31-32.) Murphy questions whether we know enough factually and are good enough morally to engage in judgments about the character of an offender rather than simply judging the character of his conduct. (Pp. 31-41.)

Echoing a concern expressed in some of his earliest published work, Murphy questions the very ground of character retribution by looking at the origins of character in upbringing and social situation. Given that so much of character depends on the happenstance of family and socioeconomic situation, and that those found to be presently character-culpable are likely to have experienced some of the worst that life has to offer, how is it fair to condemn them for the result?⁴ (P. 79.)

³ Michael S. Moore, *The Moral Worth of Retribution*, reprinted in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179 (Ferdinand Schoeman ed., 1988).

⁴ Jeffrie G. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFFAIRS* 217 (1973).

Recognition of enormous inequalities in morally formative experiences should raise questions about our own right to self-righteousness. How can we praise ourselves for good character when such character may be due primarily to our own luck in the draw of early experiences and influences, social and economic supports? Knowing this, can we really be certain that we, the law-abiding, are fundamentally better than they who violate the law?

Most important for Murphy, though, is that character condemnation can lead to brutal punishment. As Murphy states: "The road from contempt to cruelty strikes me as a short one." (P. 31.)

For all this, Murphy does not consider Nietzsche's critique a reason to reject retribution as a theory of punishment. He rather sees it as cause to scrutinize carefully contemporary punishment. It should motivate a careful examination of penal practice in light of principle. He sees how retribution's emotional lure can inspire punishments that are not actually deserved. Even if we eschew character retribution and focus on act-based retribution, the temptation to excess remains. We can easily move from condemning an offender's act and mental state, to condemning the person who committed the act, to condemning that person to inhuman treatment as punishment. Murphy notes that this slippery slope is psychological, not logical. "Not a single step logically follows from its predecessor. I fear, however, the transition is *psychologically* a rather common and in some ways compelling one, one that may ultimately tempt us to endorse cruelty and inhumanity." (P. 89.)

Thus, Murphy, who now calls himself a "reluctant retributivist" (P. 86.) fears that the principle of retribution can seem to justify passions that quickly grow beyond moral control. (Pp. 13–14.) He notes that in contemporary prison conditions we may find an expression of "vindictiveness so out of control that it actually becomes a kind of malice." (P. 14.) Murphy's most specific concern with prison conditions is the high rate of sexual violence suffered by prisoners.

Murphy offers no philosophic or legal solutions to problems of penal excess, but then the exploration of moral emotions does not promise solutions in the form of specific principles or rules that will produce particular results. Murphy still provides normative guidance, however. For a moral emotional problem, he offers a moral emotional prescription: greater self-scrutiny and cultivation of moral humility. He quotes unlikely sources on the need for emotive and penal restraint: Immanuel Kant and Judge Richard Posner. (Pp., 32, 84.) As Posner wrote: "we must not exaggerate the distance between 'us' the lawful ones, the respectable ones, and the prison and jail populations; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration." (P. 84.) Murphy says that "in punishing, we should act with caution, regret, humility, and with a vivid realization that we are involved in a fallible and finite human institution—one that is necessary but regrettable." (P. 42.)

In the end, Murphy views doubts about retribution as a virtue because they inspire moral humility. He argues that we should feel some uncertainty about punishment: "Lack of total clarity and comfortable confidence may be a moral and

political good. To the degree that we are nervous and unsure of exactly what we are doing when we punish our fellow human beings, then I am inclined to think that to the same degree we will, at the very least, be less cruel." (P. 90.)

III. KIND WORDS FOR FORGIVENESS

Murphy's concern with the excesses of retributive practice lead him naturally to forgiveness, which has long engaged his attention.⁵ Drawing from eighteenth-century preacher and theologian, Bishop Butler, Murphy defines forgiveness as a moral emotion rather than a decision about responsibility or punishment. For Murphy it is a letting go of anger, a change of attitude, a change of heart toward a wrongdoer. (P. 6.) He sees forgiveness as a healing virtue that can check our tendency to cruelty in punishment (P. 14) and a basic good in the human world. "No rational person would desire to live in a world where forgiveness was not seen as a healing virtue," he argues. (P. 14.)

There are limits, of course, to the good of forgiveness. Murphy has not changed that much. He defends resentment as a moral emotion that we should experience in response to serious wrongdoing. "If we do not show some resentment to those who, in victimizing us, flout [moral order] then we run the risk of being 'complicitous in evil.'"⁶ (P. 12.) He argues that while forgiveness should be encouraged, it should not be required. (P. 16.)

Murphy is, at his philosophic best, making distinctions between a variety of forgiveness-related concepts. He briefly and clearly distinguishes forgiveness and its legal relation, mercy. (P. 7.) Forgiveness involves a personal and often private change of heart, while mercy requires the act of a judge or other decisionmaker, usually in a matter of public concern. Mercy by its terms involves a punishment less than normally expected by law or institutional practice; forgiveness as change of heart does not require this.

He similarly distinguishes forgiveness and reconciliation. He shows how one can forgive without reconciling (as with a victim of domestic violence forgiving a remorseful abuser but not resuming a domestic relationship with him), but also may reconcile without forgiving (e.g., South Africa's Truth and Reconciliation Commission where neither remorse nor forgiveness were required as part of the reconciliation process). (Pp. 7–10.) In Murphy's view, forgiveness can readily coexist with punishment.⁷ (Pp. 45, 55.) One can give up anger at a wrongdoer and so, in the Butler-Murphy sense, forgive, and still believe that punishment for the wrong is fully appropriate.

⁵ See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988); JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* (2003).

⁶ Aurel Kolnai, *Forgiveness*, 74 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 91, 95–98 (1973–74).

⁷ Murphy disputes Thomas Shaffer's contention that forgiveness and punishment are incompatible. (Pp. 45–46, 52–57.)

IV. RETRIBUTION, REMORSE, AND APOLOGY

Forgiveness focuses on the wronged. What of wrongdoer-focused moral emotions and emotive actions? In particular, what is the nature and significance of remorse and apology? Murphy shows himself here a fan of remorse; he proves less keen on apology, though he recognizes its value in some forms and situations. He expresses serious reservations about both remorse and apology in the assessment of legal sentence.

Murphy sees the value of remorse not just in its own moral merit—the recognition of personal responsibility for wrong—but for the work it may do within a communicative conception of punishment.⁸ “Punishment can thus be seen as a social ritual” he argues, in which the offender’s symbolic expression of contempt for the victim’s worth in his crime is, “through the symbolism of harsh treatment . . . emphatically repudiated, and another message—that of the full value of the victim as an equal citizen—is emphatically asserted.” (Pp. 126–27.) Thus an offender’s remorse becomes morally relevant, representing a decision by the offender to withdraw or annul his or her previous message of disregard for the victim, and to show new appreciation for the victim’s value. (Pp. 75–76, 121–26.)

Murphy notes the significance of offender remorse (and especially its lack) to both popular and legal assessments of desert in punishment. (Pp. 130–32.) He is enough of a legal pragmatist, though, to see grave problems with including remorse in the determination of legal sentence. There is simply too great a chance that remorse might be faked, which would seriously undermine the moral and social value of any resulting penal judgment.⁹ Here he makes what seems to me a sensible, largely pragmatic distinction between sentence and clemency proceedings (P. 159.), arguing that if clemency depends on rehabilitation, then remorse is very important to its evaluation.¹⁰

⁸ Murphy does not address the potential conflict between retribution and a communicative view of punishment in their theoretical conceptions. Retribution is classically defined as an entirely past-focused justification, where punishment is measured by the wrongness of the past criminal act without concern for the consequences of its punishment. An expressive approach, at least in its justification, does comprehend the consequences of punishment as an act of moral communication or education. Many expressivists, myself included, nevertheless see the expressive good of punishment as requiring a retributive base. That is, punishment’s expressive message is not justified, nor is it probably effective, unless the punishment is deserved. Thus in its application, an expressive approach may be retributive. These are not matters that Murphy addresses here. Again, he is not attempting grand theory.

⁹ Murphy argues that because true remorse is required for rehabilitation, “the more that one stresses . . . punishment that will encourage genuine remorse and repentance, the more one should be on one’s guard against anything—fake remorse and repentance, for example—that might allow the criminal improperly to avoid such a system working properly to cut short his time and it.” (P. 158.)

¹⁰ I would add that clemency proceedings, which usually occur after a significant period of incarceration, also involve more and more reliable evidence of remorse in both the words and conduct of the prisoner.

Murphy does not address the question of remorse with respect to discretionary parole decisions. On the one hand, the importance of rehabilitation and availability of a significant body of evidence in

Murphy's approach to apology is similar, seeing the act of apology as morally significant to deserved punishment under a communicative approach if sincere, but whose sincerity is too difficult to assess in the typical sentencing situation. He notes that outside of the sentencing context, apology can have value as a pure performative—stating certain words of apology can promote reconciliation regardless of the speaker's sincerity. We are all familiar with the value of such performatives by children, where the grudging apology to a sibling, that no one believes to be genuine, can still represent an appropriate resolution of a family conflict. (P. 165) With respect to serious wrongs, however, apology must be sincere and of the right kind, telling the right kind of story, to address effectively the harm done. But again, how are we to judge sincerity? Especially in a culture accustomed to rapid and often *pro forma* apology and reconciliation, Murphy sees significant danger in providing formal legal credit for apology in sentencing. Again, clemency decisions may present a different scenario. (P. 173.)

In general, Murphy remains a skeptic of contemporary culture's embrace of apology. "Our present intellectual culture . . . strikes me as one in which apology and other expressions of remorse are often located (and often overpraised) in the context of a sentimental ideology of therapy and healing rather than, say, an ideology of truth and justice." (P. 174.)

V. LIBERALISM AND THE GOOD: A RECONSIDERATION OF LEGAL MORALISM

As with retribution, while Murphy remains a legal liberal, he now expresses reservations about liberalism as often practiced. While he does not here reject the essential thrust or values of legal liberalism, he does question its claim that law should focus entirely on what philosophers call *the right*, excluding concerns about *the good*.¹¹ According to the standard liberal view, government and law should focus on the most basic protections of individuals in prohibitions on violence, coercion, and some forms of deception. Citizens should have enforceable individual rights to ensure the maximum amount of space for individual choice, including choice about what counts as a good life, assuming no violation of others' rights. What makes for a good life should be left to individual (or group) decision,

a prisoner's words and conduct would argue for attention to remorse here. Indeed, many parole boards consider it a virtual prerequisite for release. Such a requirement can have perverse effects in at least some cases, notably with prisoners who believe themselves to have been wrongfully convicted and who therefore cannot sincerely express remorse for something they did not do. See Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

For a look at how remorse and apology are used in contemporary punishment, see Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737 (2012).

¹¹ See, e.g., WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION*, 212–28 (2002).

legal liberals have argued. The state should not use its penal powers to coerce or influence the debate. Murphy contends that this division between the right and the good cannot be kept entirely sacrosanct. It cannot even be kept entirely out of the criminal law.

In his discussion, Murphy returns to the classic Hart-Devlin debate on the role of morality in the criminal law. Back in the day, Murphy was a strong Hart supporter, arguing based on liberal principle for keeping morals, especially those relating to sexuality, out of public criminal law. Now he sees more value in Devlin's legal moralism, for the idea that the law must sometimes take a stand about the good.

Relying on Ronald Dworkin, Murphy sees liberalism as committed to government neutrality on questions of the good life. Murphy describes liberalism in this regard as positing that:

out of respect for the right of moral independence held by each citizen—the state must never use its coercive power to pursue or to force individuals to pursue a particular vision of the good life. A liberal state must, of course, concern itself with the moral issues of public peace and order. However, moral issues of personal vice and virtue, of personal worth or goodness of character, are simply not the law's business. The state must remain neutral on such matters. (Pp. 72–73.)

The criminal law, therefore, must confine itself to clearly public harms and remain neutral on the question of what constitutes a good life for individuals. That should be left to personal choice.

Murphy uses Justice Kennedy's majority opinion in *Lawrence v. Texas*,¹² finding the criminalization of consensual homosexual activity unconstitutional, to support the necessity of considering the good in constitutional law. (P. 74.) It's a powerful and intriguing example, both because it returns to one of the central questions in dispute between Hart and Devlin (the criminalization of consensual sexual activity, particularly homosexuality), and because Murphy here turns the philosophic tables: here he supports Hart on outcome (against the criminalization of homosexuality) and Devlin on rationale (taking the good into account in public law).¹³

Murphy argues that the good of consensual intimate relations, including between persons of the same sex, is central to resolving the constitutionality of Texas's criminal prohibition. In order to find the criminal law unconstitutional, the

¹² 539 U.S. 558 (2003).

¹³ For an account both jurisprudential and biographical on Hart's contributions to the debate, see NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004), especially 1–2, 221, 256–61. Hart's main argument is found in his *LAW, LIBERTY AND MORALITY* (1963).

Court must take a stand on “non-neutral goods about a good or meaningful life” involving intimate relations, which is exactly what Justice Kennedy did. (P. 74.)

There is a problem here, however, as Murphy recognizes. If we cannot exclude questions of the good from legal debate, if some legal decisions turn on what makes for a meaningful life, how do we decide “meaningful” questions? Where do we get the values that inform the good that should be expressed in law? In a heterogeneous society, committed to separation of church and state, and deeply divided over many essential questions about the good, what can we use as a source of public values to resolve legal questions?

The same problem appears in any critique of moral emotions relating to punishment. On what basis can we make the critique general and not just personal? What can we say about the good and bad of certain emotions and emotive expressions beyond, “this is what *I* think,” “this is what *I* feel,” “this is what *I* believe”? Somehow we must find a way to move from *I* to *we*, from the personal to the public. Murphy recognizes this and in response makes exactly the move that most commentators on the left would reject: he moves to religion, and particularly to Christianity. Of course, this being Murphy, the move is not quite as it first appears.

VI. THE RELIGIOUS TURN: COMPASSION AND RETRIBUTION

“What would law be like if we organized it around the value of Christian love, and if we thought about and criticized law in terms of that value?” Murphy asks. (P. 43.)

Note this question does not require adoption of a particular religious belief. It states a hypothetical. If this (for Christianity), then what (for law)? And yet the choice of Christianity as the basis for moral and legal inquiry is not accidental. Recall Murphy’s understanding that biography shapes philosophy. Murphy recognizes that Christianity is morally formative for him, as it was for Kant and is for many Western thinkers. It provides the moral background even if its theology has been rejected. Murphy illustrates the formative power of Christianity in modern Western thought by reference to what he calls the Christian atheist. “When a person brought up a Christian becomes an atheist, he tends to become a Christian atheist. The questions he chooses to make central and many of the answers that tempt him are often framed, even if he does not realize it, by the very set of beliefs he claims to reject.” (P. 44.)

Murphy presents himself as a sympathetic explorer of Christian principles rather than a committed believer. He is not writing apology here, using that word now in its theological sense of an explication and defense of religious doctrine. Rather he turns to Christianity as a common source (in the Anglo-American world) of a moral and emotive principle that can do powerful work in criminal law. The principle of Christian love can provide a moral and emotive check on what he sees as his own and others’ natural tendency to excessive anger, expressed in punishment.

Again we find Murphy in dialogue with fellow retributive legal philosopher Michael Moore. He responds to Moore's characterization of Jesus as a "clumsy" moral philosopher, at least as applied to criminal punishment, for his imprecation that only one who is without sin should condemn others for sin. (Pp. 39-40.) Moore's argument is that the usual wrongs of most people are incommensurate with the serious criminal wrongs of a few. If most have committed minor wrongs of manipulation, deceit and indifference, "[f]ew of us have raped and murdered a woman, drowned her three small children, and felt no remorse about it."¹⁴ Given that the sins, or wrongs, of the law-abiding and the criminal are so fundamentally different in degree and kind, the moral shortcomings of the former should not affect their ability to render moral judgment on the latter.

Murphy argues that this critique of Jesus's teaching, taken from the biblical parable concerning the punishment of an adulteress, misses its original point, which has to do with moral humility, and the danger of moral arrogance.

The point is not to deny that many people lead lives that are both legally and morally correct. The point, rather, is to force such people to face honestly the question of why they have lived in such a way. Is it (as they would no doubt like to think) because their inner characters manifest true integrity and thus are morally superior to those people whose behavior has been less exemplary? Or is it, at least in part, a matter of what John Rawls has called "luck on the natural and social lottery"? (P. 40.)

That serious wrongdoers deserve serious punishment does not mean that punishers may not themselves go wrong sometimes in assessing or imposing punishment. Again Murphy insists on close scrutiny of emotional motivation. Where does the urge to punish come from? How can we keep it in moral check? How can we keep punishment within the bounds of truly deserved penalties? This is where the Christian value of *agape*, of love for neighbor, may do critical moral work, at least in a society that generally respects this principle (or least says it does).

For Murphy, the principle of *agape* prohibits punishment out of hatred or other vindictive passions. (P. 60.) It argues for "punitive practices that contribute to, or at least do not retard, the moral and spiritual rebirth of criminals." (P. 50.) All this is in service, finally, of retribution.

I embrace the classic retributive idea that punishment should be proportionate to the moral gravity of the crime and the culpability of the criminal. I believe that much, if not all, of the evil and irrationality of our present punitive practices is a result of the failure to respect this retributive norm. I also believe that empathy and compassion can play a significant role in allowing us to recognize the factors that are relevant to the determination of criminal desert. Empathy and compassion, when

¹⁴ See Moore, *supra* note 3 at 188.

conjoined with a proper humility, can also play a significant role in helping us avoid the all too common mistake of confusing judgments of criminal desert with judgments that we're dealing with worthless monsters or mere scum who deserve whatever cruel indignity we choose to inflict on them. (P. 230.)

VII. EVALUATION

This is a book with many strengths, as should be obvious from all I have said so far. The ideas are consistently interesting and clearly presented. Murphy's breadth of mind is evidenced by the breadth of references. Here you will find novelist William Trevor on the soul of a serial killer (P. 17.), Frederick Nietzsche on monsters (P. 42.), Immanuel Kant on dueling and infanticide (Pp. 274–306.), Fyodor Dostoevsky on perhaps unforgivable cruelty (Pp. 181–83.) and Cynthia Ozick on repentant Nazis (P. 133.)—among many others.

Murphy writes with passion about justice and also with considerable humor. The latter trait while not entirely absent from the fields of law or philosophy, is not commonly found in the writings of either field. Here, in the course of considering the rights and wrongs of punishment, you can learn here what Karl Marx wrote about masturbation (P. 225.) and the link between assholes and awards.¹⁵ (P. 66.)

The book also has some readily apparent weaknesses. The essays appear largely as they did in their originally published versions, which makes it a bit of an intellectual grab bag. One essay, for example, comes with an introductory abstract; the rest do not. Several come from symposia and make references to other articles which are obviously not included. There is considerable overlap between essays both in theme and some content. Telling quotes that impress on first and even second reading do not pack the same punch on third or fourth encounter. Even in this eclectic collection, several of the essays seem an awkward fit, particularly an essay on jealousy, and one on Kant's treatment of infanticide and dueling.

The book is generally well presented, though not without the occasional typo or formatting error, an all too common feature of book publication today. There even appears on one occasion the ever-popular (with students especially) misreference to retributive punishment as "just desserts." (P. 179.) In the spirit of Murphy's own robust humor, I suggest indulging for just a moment the notion of a truly righteous lemon meringue pie, a morally upright tiramisu, or perhaps a Solomonic chocolate chip cookie. Okay, well, my students have much the same reaction to my classroom jokes. "Oh, that was supposed to be funny?"

¹⁵ Because inquiring minds want to know: "Philosophy stands in the same relation to the study of the actual world as masturbation stands to sexual love." Murphy cites here: KARL MARX & FREDRICK ENGELS, *THE GERMAN IDEOLOGY: PART ONE* 103 (C.J. Arthur ed., 1970). On the subject of awards, Murphy quotes a character from the movie *THE SWIMMING POOL* (Celluloid Dreams 2003): "Awards are like hemorrhoids—eventually every asshole gets one."

To turn serious once more: none of these criticisms amount to much against Murphy's effort to connect the philosophic study of moral emotions and punishment with its actual practice in the contemporary United States. In these essays, we see that law and philosophy scholarship can be personal, engaged, passionate, accessible, broad-minded, provocative, and disturbing. It can even supply a moral lesson. For me the lesson is that when it comes to punishment, whether justified as retributive, deterrent or otherwise, recognizing human fallibility is not just a good thing, but the essential thing; it should be the foundation on which all else builds.

VIII. HUMILITY AND THE LAW PROFESSOR: A VIEW FROM JAIL

And now for something completely different, as Monty Python was wont to say. Taking full advantage of the creative bounds of this journal, I want to pick up on the themes of biography and humility found in Murphy's essays to add thoughts based partly on my own biography. I want to accept Murphy's implicit invitation to conversation about the way that biography influences philosophy, and the need for humility in criminal justice work. As will be obvious, my experience is idiosyncratic, which makes the value of my observations limited. If there are truths here they do not represent *the* truth.

At each stage of my professional journey, I have thought that I knew much more than I actually did about law and criminal justice. Starting out as a newspaper reporter in my early twenties, I covered state courts in Jacksonville, Florida. I observed many criminal proceedings, including a number of capital murder trials. (Jacksonville at the time was one of the nation's leading jurisdictions in sending defendants to death row.) At the time, I thought I understood almost all of what went on in the courtroom, even when the lawyers argued law. True, I never did quite figure out that hearsay thing (although I did pick up that, when in doubt, claim state of mind), but that never impressed me as actually critical to deciding most cases. When I went to law school several years later, I learned how wrong I had been. I realized how superficial my understanding of criminal law and procedure had been, how much I did not know about the cases that I had been reporting to the public.

Looking back, I see the same realization coming at each stage of professional development. Practice as a federal prosecutor required an understanding of the law and criminal justice far beyond anything broached in law school. Then moving to academia, I found that teaching law required a grasp of doctrine and legal theory well beyond anything needed for practice. Writing legal scholarship required yet another level of understanding. At each stage, the learning process was humbling.

More recently, I have taken up yet another kind of work in criminal justice: jail chaplaincy. In addition to law teaching and writing, I do spiritual programs

both in the county jail with adult men and in juvenile hall with teenage boys being tried as adults.¹⁶

Again there has been a steep learning curve. Working as a journalist, a trial lawyer, and a law professor did not exactly prepare me for ministry with the incarcerated. But that was no surprise. I knew it would be different; I just hoped to learn. The surprise here, *again*, was how much I did not know about criminal justice, this time about its reality for prisoners. How different it all looks from the inside.

As a chaplain I visit jails and juvenile detention facilities. Now visitors to foreign places see things that others do not, but they miss a great deal that natives of those places know. When it comes to incarceration, I am no native. I have not worked in corrections. I have not been locked up as an inmate. My knowledge of life inside is therefore superficial. And yet I know so much more than I did before I went in, even after more than thirty years of work and study in the field of criminal justice.

From the outside, incarceration is all about crime and law enforcement, about judgments of retribution and assessments of public safety. It seems an intentional response to intentional deeds. On the inside, in jail, what impresses most is the machinery of incarceration: the implacable, impervious, impersonal, and sometimes inscrutable workings of a carceral system devoted to processing bodies. This is a world (for adult inmates) of color-coded uniforms and numbers for both officers and inmates, where prisoners are tagged by plastic bracelets. For me, the scariest place inside is the elevator in the county jail downtown, which I take from the second floor to the seventh floor for a spiritual formation class in 272, as the unit is nominated. It is an enormous, freight-sized, scarred steel container that I always fear will stop, and no one will know or care. It symbolizes for me the machine of punishment that cares nothing for ideology, that is frequently deaf to personal appeal, that moves or does not according to decisions made at a distance, by persons or forces unseen. This is a place far from the law of the courtroom.

Just because the experience of incarceration is so impersonal, personal connections between complete strangers can be powerful inside. My life experience has little in common with that of those locked up. That is actually a

¹⁶ In the Twin Towers Correctional Facility (part of the county jail) in Los Angeles, I teach what is called a Spiritual Formation class through the auspices of PRISM, a ministry of the Episcopal Diocese of Los Angeles. I have also developed, with my wife Linda Goodman Pillsbury, LCSW, a program for healing from violence called "Strong and Free Inside," which we conduct in the so-called Compound in the county's juvenile hall in Sylmar, California, where males ages fourteen to seventeen are held while being tried as adults. This program is conducted under the auspices of Jesuit Restorative Justice.

I should also note that as part of my training to be an Episcopal deacon I took a unit of Clinical Pastoral Education, serving as a chaplain intern in a hospital for a summer. Mostly this was an experience well-removed from criminal justice—but not entirely. During that summer, a patient I saw, on hearing of my criminal law background, asked if I was doing the hospital work as penance for my past life. He had a rather dark view of criminal practice based on what he had seen of his father's work as a criminal defense attorney.

serious understatement. On almost no points of basic comparison—race or education or class or family background or neighborhood—do we match up. If such commonality was a prerequisite for connection, it would not happen. But it is not. The men and boys I see are hungry for respect, hungry to be seen and heard for who they truly are, and anyone who shows that respect, who is truly interested in the person sitting opposite in that molded plastic chair under the fluorescent lights, will be respected and appreciated in return.

Inside, I am reminded of the power of the personal in learning. Knowing about the statistical connection between addiction and criminality is not the same as hearing the stories of men who have spent years struggling with it. Knowing about the connection between violence in the family and violent offenses is not the same as hearing a teen describe his father bleeding in the kitchen after having been shot by his mother. And then there are the little things I hear and learn that make me stand in a different place in the world than I did before, like when I was teaching forgiveness and asked the men who were in a high-security unit about what forgiveness felt like. One man responded in a slightly puzzled, offhand way that he really couldn't say because he had never experienced it. He couldn't remember ever having been forgiven. Or in a class on belonging, a young man saying that since the age of eight he had been hanging out at homeless encampments because that was where he felt most at home.

Knowing about the importance of connection to community is not the same as speaking with a teen likely facing many years in prison for murder to see if he really didn't want to come to our next session. He had been a willing participant before. He looked up from a dominoes game in the day room and flinched a little when I told him that this would be the last of our classes, but he told me he couldn't come because he was expecting a call from his mom. Or seeing men in jail jumpsuits in their twenties or thirties who break down at the thought of what they have done to their parents or wives or girlfriends or children.

None of this will come as news to anyone passingly familiar with the criminal justice system. It is nothing new. And yet knowing it personally is different than knowing it generally.

Which leads me to my final point, which directly connects to the theme of Murphy's book. Yes, there is a direct connection in all this. It concerns the way that modern American punishment law in many jurisdictions, including my home state of California, has flouted time-honored wisdom about legal judgment, by requiring that punishment in some of the most important criminal cases be rendered impersonally, denying the convicted a meaningful opportunity to be seen and heard as a unique person. It concerns what are, in effect, mandatory life sentences for a variety of murder offenses.

What might have begun as retribution has been converted into a slogan: do the crime, and you do the time.¹⁷ This slogan in turn supports a version of what

¹⁷ Political discourse may employ terms from punishment theory, but often in very selective fashion, without regard for the distinctions that give the theories normative shape. Thus in the

Murphy calls character retribution. It condemns the offender to life in prison based on the category of his criminal conviction rather than the particulars of criminal deeds. This is the rationale of modern mandatory penalties, found in both mandated penalties for first or second degree murder, and mandatory sentencing enhancements when these are pled and proven. It supports trying juveniles as adults and punishing them as adults. Throughout, sentences are constructed according to offense category, with significantly different types of offenses lumped together. Attempted murders may be treated the same as murders, felony murders the same as intentional murders, accomplices the same as principals, all with large enhancements for the use of a gun and gang involvement. This is why the youth, all black or brown, aged fourteen to seventeen who I meet in the Sylmar juvenile detention hall, are commonly facing penalties of thirty to life, fifty-five to life, or even hundreds of years to life.¹⁸

Because these penalties are largely mandatory upon conviction, when it comes time for sentencing these young people rarely get seen for who they are, and certainly not for who they could be. The law does not permit it. That is exactly how many members of the public want it. After all, these are gang bangers and killers. Do the crime, and you do the time. They are their legal record.

I believe that if more could see these individuals as individuals, this might change. The public would not suddenly favor rehabilitation over retribution. I do not. Many would still favor long adult sentences for serious violence, regardless of age. But I do not think that our present system that objectifies according to criminal category could be maintained. I think the experience would humble them, as it has humbled me. Notice this is not an argument based on ideas, but on personal experience.

political realm, deserved punishment becomes giving criminals their due, with desert status based entirely on category of conviction or convictions, without attention to culpability based on particular choices. Deterrence becomes a concern about danger based purely on offense category, with virtually no assessment of punishment efficiency either in the particular case or generally.

¹⁸ Currently, a sentence of life without chance of parole is also possible for juveniles convicted of first-degree murder. CAL. PENAL CODE § 190.2 (West 2008). Under California law, many forms of felony murder and all premeditated murders are punished by a minimum of twenty-five years to life. CAL. PENAL CODE § 189 (West 2008). This sentence must be doubled (fifty to life) if the defendant used a firearm in the offense and proximately caused death or great bodily injury. CAL. PENAL CODE § 12022.53 (West 2012). Attempted first-degree murder is punished by life imprisonment. CAL. PENAL CODE § 664 (West 2010). Offenses committed as part of gang activity will bring additional terms under provisions for gang enhancements. CAL. PENAL CODE § 190.2 (West 2008).

For an example of sentencing in a juvenile gang shooting case in California, see *People v. Caballero*, 55 Cal.4th 262 (Cal. 2012), in which a 16-year-old defendant was sentenced to 110 years to life in state prison for three counts of attempted murder with sentencing enhancements for a single incident in which he shot at three rival gang members. Two victims were unharmed; one was hit in the upper back. The California Supreme Court reversed the sentence not on statutory grounds but on the basis of *Graham v. Florida*, 130 S. Ct. 2011 (2010), as a form of cruel and unusual punishment under the Eighth Amendment.

As legal scholars and teachers we put our faith in ideas. In the contemporary academy, we strive to fly high, far above ordinary understanding to spot patterns not visible on the ground, or we drill deep, exploring foundational structures hidden from ordinary sight. Then we try to change the law by changing our conceptions of it. We argue with each other, often politely, sometimes fiercely, about ideas, but also for recognition. It's worth just a moment to see how much we necessarily miss in these efforts, because we attend to ideas and trends and not to individuals and their unique experiences. We listen to each other, meaning other lawyers and academics, but we do not listen much, certainly not closely and sympathetically, to those who do not speak in our terms or who do not share our basic values. Yet who must we persuade to change the law? Will persuading like-minded colleagues do the trick? If not, if people who do not share our overriding concern with intellectual coherence hold the key to change, if people who approach criminal justice from the opposite direction, focusing more on harms to victims than the lives of offenders, are critical to the law's transformation, then must we, nevertheless, listen to them and listen closely? I think so.

What I have learned inside I probably knew before, but now I know it in a deeper way. In the end, we will not be saved by ideas, but by caring. We will not change this broken criminal justice system by winning logical arguments about foundational principles or reworkings of legal doctrine. Change will come only if we care more about the people affected by crime: offenders and victims, families and communities. It will come from seeing people in their unique and messy complexity. It's a humbling notion for those of us who make our living by ideas.

